Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

STANLEY D. SCHEETZ, TRUSTEE OF THE SEVILLE CORPORATE PARK SUBDIVISION TRUST U/A DATED DECEMBER 1, 1988,

Petitioner,

v.

THE VILLAGE OF SEVILLE, OHIO,

Respondent.

On Petition For Writ Of Certiorari To The Medina County Appeals Court, Ninth Judicial District Of Ohio

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Is it proper for Ohio Courts to refuse to recognize an Ohio private property owner's United States Constitution, Fifth Amendment "takings" rights as pronounced by the United States Supreme Court and instead recognize only Ohio State Constitutional "takings" rights as pronounced by the Ohio Supreme Court when the Ohio "takings" rights offer the private property owner less constitutional protection than the Federal "takings" rights?

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

I. Misstatements in Respondent's Statement of Case.

A. Ohio's conjunctive test does not follow the spirit of Lucas.

The Respondent is mistaken when it states that the Ohio conjunctive test " * * * follows the spirit of this court's decision in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S.Ct. 2886 (1992)". (Brief in Opp. p. 2). This honorable Court in *Lucas* and *Agins v. City of Tiburon,* 447 U.S. 255, 100 S. Ct. 2138 (1980) adopted a disjunctive test to provide property owners compensation when their property is taken. A plain reading of the Takings Clause of the Fifth Amendment requires compensation for a taking whether a legitimate government interest is advanced or not. Ohio's conjunctive test leaves a property owner without compensation where such owner has sacrificed the economic viability of his property to advance a legitimate government purpose.

Respondent is again mistaken when it states: "Both facets of the Ohio regulatory takings test are identical to the test in Lucas." (Brief in Opp. p. 2). This is not true because the Federal test requires the Trial Court to consider a property owner's investment back expectations in determining the economic viability prong. No such consideration is required under the Ohio conjunctive test.

B. Petitioner was not afforded adequate relief by the Ohio Courts.

Respondent argues that: " * * * the analysis performed in this case afforded the Petitioner adequate relief

because he failed both facets of a takings case." (Brief in Opp. p. 2). Respondent's assertion is false because the Trial Court applied the wrong test. The Trial Court never considered Mr. Scheetz' investment backed expectations when analyzing the economic viability prong of the test.

II. Misstatements in Respondent's Statement of Facts.

A. Respondent never changed the zoning from highway commercial to commercial prior to litigation.

Respondent states: "The Respondent denied this amendment, and later voted to change the zoning to a commercial district from a highway commercial district." (Brief in Opp. p. 3). This assertion is false. The Village of Seville never changed the zoning of Mr. Scheetz' Undeveloped Land to commercial from highway commercial.

B. Ohio Courts only applied the conjunctive test.

By Respondent's own admission, the Trial Court applied only the conjunctive test (Brief in Opp. at 3d paragraph, p. 3). Respondent again misstates the facts when it asserts that the Appeals Court recognized Mr. Scheetz' argument for *Lucas'* disjunctive test, but affirmed the Trial Court's decision. (Brief in Opp. at 4th paragraph, p. 3-4). The Appeals Court applied Ohio's conjunctive test as set forth in *Gerijo, Inc. v. Fairfield*, 70 Ohio St. 3d 223, 638 N.E. 2d 533 (1994). See Decision and Journal Entry of the Medina County Court of Appeals marked as *Exhibit C* to the Petitioner's Appendix.

III. Respondent's Reasons for Denying *Writ* of *Certiorari* are without merit.

A. Respondent's interpretation of Lucas is without merit.

Respondent argues that *Lucas* requires the property owner's reasonable expectations to be shaped by each state's property laws. (Brief in Opp., at 3d paragraph, p. 6). Assuming *arguendo*, that Respondent is correct, Ohio Law would preempt Federal Constitutional rights merely because it is the history of Ohio property law to do so. Under Respondent's argument, even though Ohio law violates an individual's United States Constitutional rights, such laws should be upheld because they are state law tradition.

B. A presumption in favor of zoning laws is not conclusive proof that the zoning law is constitutional.

Respondent argues that in a state where there is a presumption in favor of zoning requirements, a property owner must "reasonably expect" that his land would be affected by zoning laws. (Brief in Opp., 1st paragraph p. 7.) While this is certainly true, a property owner should also reasonably expect that if the government changes the zoning such that the land owner has lost the economic viability of his property, he should be compensated for the loss of such property.

IV. The "Beyond a Fair Debate" Standard.

Respondent states: "Unlike the petitioner's assertion, Ohio property owners do not have to satisfy a criminal

standard in regulatory taking cases." (Brief in Opp., 2nd paragraph, p. 7). Respondent is wrong. The Ohio Supreme Court itself stated in *Central Motors Corporation v. City of Pepperpike*, 73 Ohio St. 3d 581, 584, 653 N.E. 2d 634 (1995), that: "This court has stated that there is **little difference between the 'beyond fair debate' standard and the 'beyond reasonable doubt' standard**". By the Ohio Supreme Court's own admission, Ohio property owners have to prove their constitutional "takings" rights by a standard substantially similar to the standard used in criminal cases in Ohio.

V. Mr. Scheetz satisfies the requirements of the United States Supreme Court Rules.

Respondent incorrectly asserts that Mr. Scheetz should be denied a *writ* of *certiorari* because Mr. Scheetz does not meet the requirements of United States Supreme Court R. 20. (Brief in Opp. At p. 8). This rule concerns "extraordinary *writs*" as set forth in the Supreme Court Rules and not *writs* of *certiorari*. Mr. Scheetz meets the requirements of United States Supreme Court Rule 10 concerning *writs* of *certiorari* since the Ohio Supreme Court has decided an important federal question in a way that conflicts with relevant decisions of this honorable Court.

The Ohio Supreme Court has ignored the mandates of the Supremacy Clause of the United States Constitution, and the holdings of the United States Supreme Court in cases such as *Agins* and *Lucas*. This case provides this Court the opportunity to remind the Ohio State Supreme Court that the United States Constitution, and

this honorable Court's decisions, are the Supreme Law of the Land.

VI. The Ohio Appeals Courts have requested that the Ohio Supreme Court reconsider its *Gerijo* and *Central Motors* cases since these cases conflict with this honorable Court's prior decisions.

Ohio Appellate Courts have urged the Ohio Supreme Court to resolve the conflict between its decisions and the decisions of the United States Supreme Court. The Clermont County Appeals Court stated:

> The apparent conflict between the conjunctive test adopted in Gerijo and the disjunctive test employed in *Agins* and *Lucas* places this court in a difficult position. On one hand, state courts are bound to follow guidelines which the United States Supreme Court has set up on facts involving federal constitutional questions * * * On the other hand, this court has no authority to overrule the Ohio Supreme Court, and is, accordingly, bound by and must follow decisions of the Ohio Supreme Court, which are regarded as law unless reversed or overruled * * * After much consideration, this court will follow the Ohio Supreme Court judgment in *Gerijo*. **This court, however, expressly invites the Supreme Court to reconsider its decision in *Gerijo*, or explain why the conjunctive test adopted in *Gerijo* is not in conflict with the United States Supreme Court decisions in *Agins* and *Lucas*.** *Rumpke Road Development Corporation v. Union Township Board of Trustees* (Clermont County 1996), WL 622602, unreported. (Emphasis added).

The Trial Court in *Spires v. Village of Baltimore* (Fairfield County, 1996), WL 363431, unreported, noted that the analysis used in *Gerijo* demonstrated that the Ohio Supreme Court had abandoned the proper constitutional principals pronounced by the United States Supreme Court in *Agins v. City of Tiburon*, 447 U.S. 255, 100 S. Ct. 2138, 65 L.Ed. 2d 106 (1980). The trial court followed the *Agins* standard and found for the property owner. The Appeals Court then reversed stating: "The Trial Court is obligated to follow the law set forth by this state's highest Court, as are we." *Spires* at 2.

The appeals court in *Kuhn v. Board of Commissioners of Hamilton County* (Hamilton County, 1996) WL 134464, unreported, found that a zoning ordinance had stripped a property owner's land of any economically feasible use. Under the federal test, the property owner would have prevailed. However, the court ruled against him because as the court noted:

> We are constrained by the difficult burden of proof The [Ohio] Supreme Court has placed upon those attacking the constitutionality of a zoning ordinance * * * . Since appellants failed to meet their burden of proof on the other prong of the test, **we must reluctantly affirm the judgment of the trial court even though we believe that the zoning is confiscatory.**" *Kuhn* at 3-4. (Emphasis added).

In a similar case, *U.S. Cement Company v. Poland Township Board of Trustees*, (Mahoning County 1994) WL 650238, unreported, the appellate court recognized that a property owner had a meritorious claim that a zoning ordinance had stripped his land of any economically

viable use. But once again, the court was forced to deny the property owner's claim for relief because " * * * The [Ohio] Supreme Court has ruled that the party attacking the zoning ordnance must prove *both* elements of the test beyond fair debate. **This is almost an impossible hurdle to overcome.**" *U.S. Cement Company* at 6. (Emphases added).

Ohio law leaves property owners helpless against confiscatory zoning ordinances. The dissenters in *Gerijo* even stated:

> It is hard to imagine the zoning scheme that would not pass the majority's conjunctive test. Fortunately the U. S. Supreme Court has provided a test that provides affected land owners with refuge from unreasonable governmental action. *Gerijo* at 231.

The pleas of Ohio Appellate Courts, the dissenting justices in the *Gerijo* and *Central Motors* cases and Ohio land owners should be responded to by this honorable Court.

VII. Respondent's argument that Mr. Scheetz would not succeed under the federal disjunctive test is mere speculation and provides no basis to prevent this Court from granting *certiorari*.

Respondent's argument that Mr. Scheetz would fail the federal disjunctive test (Brief in Opp. p. 9) is rank speculation. The Respondent improperly assumes that since Mr. Scheetz failed both facets of the Ohio conjunctive test, it would by definition fail the federal disjunctive test set forth in *Lucas*. The Trial Court in applying the Ohio test was not required to consider Mr. Scheetz'

investment-backed expectations with respect to his purchase and development of the property. Had the Trial Court considered his investment-backed expectations, Mr. Scheetz quite likely would have satisfied the first prong of the Ohio and Federal Tests.

VIII. The Trial Court never considered Mr. Scheetz' investment-backed expectations.

In *Penn Central,* this Court expressly stated that one factor to be examined is the " * * * extent to which the regulation has interfered with distinct investment back expectations". *Penn Central Transportation Co., v. City of New York,* 438 U.S. 104, 98 S. Ct. 2646 (1978).

When Mr. Scheetz purchased the property it was zoned for "all" commercial uses. Relying on this, he made substantial investments in infrastructure improvements capable of handling a wide variety of commercial uses. After the zoning ordinance was changed, Mr. Scheetz only had four uses available for Undeveloped Land. Thus, he lost nearly all of the land's original investment opportunities and the value of his infrastructure improvements. The Trial Court failed to consider Mr. Scheetz' investment-backed expectations and sustained objections to evidence Mr. Scheetz proffered to prove his investments in the Undeveloped Land.

IX. Mr. Scheetz never argued that his undeveloped Land had been taken because it could not be used for its best use.

Respondent attempts to recast Mr. Scheetz' argument by implying that Mr. Scheetz is asserting that the Undeveloped Land has been taken since the Respondent has denied the property's "highest and best use" or most "effective or efficient" use. (Brief in Opp. at 2d paragraph, p. 13). This is not true. Mr. Scheetz only asserts that the Zoning Ordinance has deprived him of the practical uses of the Undeveloped Land that he once had. What the property's "highest use" would be is irrelevant to the instant appeal.

X. Mr. Scheetz never argued that his Undeveloped Land had been taken because it could not be used for multi-family dwellings.

Mr. Scheetz never argued that his land was deprived of all economic viability because he was denied the right to build multi-family dwellings.[1]

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[1] The factual inaccuracies contained in Respondent's Brief are revealed in the record. Mr. Scheetz is not requesting this honorable Court to decide issues of fact.

CONCLUSION

This case presents important United States Constitutional issues concerning the balance of federal power and control over unreasonable state action. For the aforementioned reasons, Mr. Scheetz' petition for a *writ* of *certiorari* should be granted.

Respectfully submitted,

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